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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 687

ABRAHAM NEWMAN,

Appellant,

against

ROBERT E. MURPHY, WARDEN OF AUBURN STATE PRISON, AUBURN, N. Y.

JURISDICTIONAL STATEMENT

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Sec. 1257(2).

The judgment of the Appellate Division, filed October 31, 1951, herein sought to be reviewed is the judgment of the court of last resort, since the court of appeals has denied leave to appeal to that court. *People* v. *Hatzis,* 297 N. Y. 163, 77 N. E. 2d 385.

> (5,-6) "So interpreted subdivision 3 of section 520 permits appeal to this Court in any criminal case only upon a certification by a justice of the Appellate Division or by a judge of the Court of Appeals as therein provided."

Petitioner questioned the constitutionality of Section 212 of the Correction Law as amended by Chapter 70 Laws of

1936. And alleged that the amended statute is *ex post facto* as to him, and is repugnant to Article 1, Section 10, of the Constitution of the United States.

Amended Section 212 of the Correction Law, as copied from the booklet, "Rules of the Board of Parole for State Prisons and the Elmira Reformatory and Laws Relating to Parole," pg. 14:

> Section 212. Prisoners Subject to Parole.
>
> Every person sentenced to an indeterminate sentence and confined in a state prison, when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. The time of his release shall be discretionary with the board of parole, . . ."

From the same titled booklet dated 1935, Section 212 prior to the amendment reads as follows:

> Section 212. Prisoners Subject to Parole.
>
> Every person sentenced to an indeterminate sentence and confined in a state prison *who has never before been convicted of a crime punishable by imprisonment in a state prison,* when he has served a period of time equal to the minimum sentence imposed by the court for the crime of which he was convicted, shall be subject to the jurisdiction of the board of parole. (Italics mine.)

Since petitioner was sentenced to a term of 20 years to life, on June 1934, and he had served a prior term of 3 years 6 months to 7 years in state prison (1930 to 1933) the New York State Board of Parole had no jurisdiction as to petitioner's release at the time that petitioner was convicted and sentenced. And the App. Div. in *Pizza* v. *Lyons, supra,* has ruled to that effect (Decision appended hereto).

> "Prior to 1936 the parole board had no jurisdiction over second offenders."

At the same time the App. Div. ruled that, *Pizza* v. *Lyons*, *supra*:

> "Chapter 70 of the Laws of 1936, effective March 6, 1936, amended section 223 of the Correction Law and broadened the Board's jurisdiction to every person given an indeterminate sentence to a state prison on or after July 1, 1928."

The App. Div. has decreed that by retroactive legislation the Board of Parole was given discretionary jurisdiction over petitioner, wherein petitioner's position was worsened in that he must now carry the additional burden of also obtaining a favorable decision from said board before he can obtain his release on parole, and to date he has been held for two years reconsideration only. And since this decision can be repeated over and over again, so that the sentence for Murder 2nd degree can be changed into one for Murder 1st degree and a sentence of natural life. It is proper that this Honorable Court review this case to ascertain whether or not it is *Ex Post Facto* legislation.

In *In re Medley, Petitioner,* 134 U. S. 155, 1890, the Supreme Court stated as follows:

> "* * * any law which was passed after the commission of the offense for which the party is being tried, is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed * * * or alters the situation of the accused to his disadvantage."

In a more recent case involving *ex post facto* legislation in a state, this Honorable Court held unconstitutional a statute which is similar in effect to the 1936 statute here attacked in *Lindsey* v. *Washington,* 1937, 301 U. S. 397, 57 S. Ct. 797, 81 L. Ed. 1182, the state indeterminate sentence statute in force at the time when the crime was committed has allowed the trial judge in his discretion to fix a maxi-

mum sentence less than the statutory maximum. The later statute, under which the petitioner was sentenced, required the trial judge to give him the statutory maximum period of confinement, and release him upon parole for the balance of the maximum sentence, subject to the revocation of parole by the board or by the governor.

In holding the latter statute invalid as *ex post facto*, this Honorable Court stated:

> "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."

Article 1, Section 10, of the Constitution of the United States, forbids the passage by any State of an *ex post facto* law.

This Honorable Court has often construed this provision and ruled that laws may not be given retroactive effect unless they leave untouched the substantial protections surrounding an accused person at the time of the commission of the crime alleged.

WHEREFORE, petitioner prays for the allowance of the appeal so that this cause may be reviewed by this Honorable Court and that the judgment may be reversed, and for such and further relief as to this Court may seem meet.

Respectfully submitted on February 21st, 1952.

ABRAHAM NEWMAN,
Appellant in propria persona,
135 State Street,
Auburn, New York.

Office - Supreme Court,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 687

ABRAHAM NEWMAN,

Appellant,

vs.

ROBERT E. MURPHY, WARDEN OF AUBURN STATE PRISON, AUBURN, NEW YORK

APPEAL FROM THE SUPREME COURT, COUNTY OF CAYUGA, STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM

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